No. 12700

In the United States Court of Appeals for the Ninth Circuit

FEDERAL TRADE COMMISSION, PETITIONER

v.

WHITNEY & COMPANY, A CORPORATION, ITS OFFICERS AND JAMES R. O'BRIEN, HIS REPRESENTATIVES, AGENTS AND EMPLOYEES, RESPONDENT

ON APPLICATION FOR ENFORCEMENT OF ORDER TO CEASE AND DESIST

BRIEF FOR PETITIONER

FEDERAL TRADE COMMISSION,
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AUTHORITIES CITED

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I

INTRODUCTION

This proceeding, instituted pursuant to the provisions of Section 11 of the Clayton Act (38 Stat. 734; 15 U. S. C. 21), arises upon the application of the Federal Trade Commission, petitioner, for a decree requiring respondents Whitney & Company, a corporation, and its officers, and James R. O'Brien, an individual, and his representatives, agents, and employees, to obey a certain order to cease and desist

entered against them by the Commission on March 25, 1946.[1]

On February 12, 1945, the Federal Trade Commission issued and duly served upon the respondents a formal complaint (R. pp. 3–11) charging respondents with having violated Section 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526, 1527; 15 U. S. C. 13 (c)). On February 26, 1945, respondents filed their original answer, but on January 8, 1946, withdrew it and filed in lieu thereof a substitute answer dated December 11, 1945, in which they admitted "each and every material allegation of fact set forth in" the complaint and waived "all intervening procedure, including hearings as to the facts, Trial Examiner's Report, and the filing of briefs and oral argument" (R. pp. 15–18). Respondents averred, however, that they had discontinued the unlawful practices and had no intention of resuming such practices.

On March 25, 1946, the Commission made its report (R. pp. 19–26) setting forth therein its findings as to the facts which accord with the allegations of the complaint, concluded (R. pp. 25–26) that respondents had violated Section 2 (c), and issued and duly served its order (R. pp. 27–29) to cease and desist from:

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[1] The order also ran against Puget Sound & Alaska Trading Company, Inc., and its officers, and Carl Rubenstein, individually and as a copartner trading as Carl Rubenstein, and their respective representatives, agents and employees. Puget Sound & Alaska Trading Company, Inc., was dissolved on December 31, 1946, and Carl Rubenstein died March 19, 1947; therefore, they are not made parties to this proceeding.

paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, upon purchases made for such buyer's own account.

Thereafter, on April 19, 1946, respondents filed their report of compliance stating that they were fully complying with the order of the Commission and were no longer granting or allowing the prohibited commission, brokerage, or discount.

On or about July 10, 1947, the Commisison directed its Seattle Office to contact respondents and see if they were complying with the Commission's order. This investigation disclosed that Carl Rubenstein died March 19, 1947; that Puget Sound & Alaska Trading Company was dissolved on December 31, 1946; that Carl Rubenstein (partnership) was incorporated under the laws of the State of Washington in January 1947; and that James R. O'Brien, Charlotte E. Jung, and Sam Rubenstein were President, Vice President, and Secretary-Treasurer, respectively, of corporate respondent Whitney & Company; that respondents had moved their office and principal place of business from 3001 Smith Tower Building, Seattle, Washington, to 860 Central Building, Seattle, Washington.

During the period of time that the Commission had its Seattle Office ascertain if respondents were complying with the order, the Commission had under way an informal investigation of a number of brokerage firms upon informal complaint that the various firms were receiving and accepting brokerage on pur-

chases made for their own accounts. One of these brokerage firms was Christian Brokerage Company of Atlanta, Georgia. Investigation of Christian Brokerage Company developed the fact that this firm was receiving and accepting commission, brokerage or other compensation, allowance or discount in lieu thereof, from various sellers in violation of Section 2 (c) of the Clayton Act, as amended; and resulted in the Commission issuing a complaint charging Christian with violation of the Act. The books and records of Christian disclosed that among the sellers paying Christian unlawful brokerage, or other compensation in lieu thereof, was Whitney & Company, of Seattle, Washington, corporate respondent. Photostatic copies were made of those parts of Christian's books and other records showing the payment to Christian by Whitney of this illegal brokerage. The Commission concluded that these photostatic copies of Christian's books and records were sufficient to establish the fact that respondents here had refused, neglected, and failed to obey the order of the Commission. The Commission therefore filed its pending application (R. pp. 30–39) before the court seeking an enforcement of its order. This proceeding is civil and preventive, not criminal or punitive, and no penalty is authorized or sought to be imposed. The purpose of the Commission's application here is merely to obtain a decree requiring respondents to obey the cease and desist order issued on the 25th day of March 1946.

II

QUESTIONS PRESENTED

1. Whether the Commission's order to cease and desist was properly entered.

2. Whether the Commission's application for enforcement charges respondents with having violated the order to cease and desist.

3. Whether formal proof of violation of the Commission's cease and desist order is necessary to entitle the Commission to a decree of enforcement.

4. Whether the evidence of violation now before the court is sufficient to support an enforcement decree.

III

ARGUMENT

1. The Commission's order to cease and desist was properly entered

A. The statute

Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary

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is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid. [49 Stat. 1527; 15 U. S. C. § 13 (c).]

B. The facts

The facts as charged in the complaint (R. pp. 3–11) and admitted by respondents in their answer (R. pp. 15–16) and found by the Commission (R. pp. 19–25) may be summarized as follows:

Respondents have their office and principal place of business in Seattle, Washington, and are engaged in the business of packing and in the sale and distribution of canned sea food products. Respondents cause the sea food products sold by them to be transported from the State of Washington to purchasers thereof located in various other States of the United States. Respondents sell their sea food products through legitimate intermediaries who act as their agents and to whom commission and brokerage fees are paid for the services rendered. Respondents also sell their sea food products direct to buyers. Respondents sell their sea food products under their own brand names such as "Bestred", "Farbest", "Blue Bird", "Best Yet", "Red Rambler', "Sprite", "Whitney's Best", "Whitworth", "Golden Shore", "Sea Run", "Northern Gem", and "North View". Respondents also sell such sea food products under brands of their buyers which are different from respondents' brand names and which identify the sea food products with the particular buyer or distributor.

Since June 19, 1936, respondents, in connection with the sale of their sea food products in interstate commerce, have sold such products under their own brands or under the brands of their buyers to direct buyers who purchase such products in their own names and for their own accounts for resale, upon which respondents have paid or granted to such buyers, directly or indirectly, commission, brokerage, or other compensation, or allowances or discounts in lieu thereof.

The direct buyers transmit their own purchase orders direct to respondents, who invoice and ship such orders direct to the buyers and collect the purchase prices from them. Respondents pay such buyers commissions or brokerage fees on such purchases by deducting or allowing from the invoice price an amount equal or approximately equal to the commission or brokerage fees paid by respondents to their regular brokers; or by selling such direct buyers at a net price which reflects brokerage.

These direct buyers do not operate in the manner in which true brokers operate; they are traders for profit, purchasing and reselling the product in their own names and for their own accounts, taking title to the goods and assuming all the risks incident to ownership.

They resell such merchandise at their own prices and terms, not dictated by respondents, and either make a profit or suffer a loss on such resale. The direct buyer purchases from several sellers, including respondents, and purchases where he can obtain the

most favorable price or most favorable commission or brokerage. If the merchandise is lost or damaged in transit, the direct buyer files the claim with the carriers and collects damages from the carriers for his own account. The direct buyer stores the goods purchased in his own warehouses and insures such goods at his own expense or stores such goods in a public warehouse and pledges warehouse receipts and insurance contracts on such products as security for bank loans.

It was upon the basis of the admitted facts, of which the above is a brief summary, that the Commission concluded that respondents had violated and were violating the provisions of Section 2 (c) of the Clayton Act, as amended, and issued its order to cease and desist; all of which is more fully and completely shown in the findings as to the facts (R. pp. 19–26) certified with the record.

In determining whether respondents had violated Section 2 (c) of the Clayton Act, as amended, as charged in the complaint, the court will want to know if the record establishes (1) sales made by respondents in interstate commerce, and (2) payment by respondents of prohibited commission or brokerage on such interstate sales.

C. Interstate commerce

The complaint alleged that since June 19, 1936, each of the respondents "has been and is now engaged in the buying, selling and distributing of canned salmon, canned tuna, canned mackerel and other canned sea food products for their own account for resale" and that respondents "have sold and distributed a sub-

stantial portion of their sea food products * * * to buyers located in States other than" the State of Washington, and as a result of such sales, the sea food products are shipped and transported across State lines (Complaint, Par. Three, R. p. 6).

By their answer dated December 11, 1946, respondents admitted the above allegations of fact as set forth in the complaint (Ans., R. pp. 15–16).

D. Payment of prohibited brokerage or commission

The complaint alleged that in addition to selling their canned sea food products through legitimate brokers or intermediaries, respondents also sell direct to buyers without the use of brokers or intermediaries, such buyers being referred to as direct buyers who purchase in their own name and for their own account for resale. The complaint further alleged respondents paid to such buyers, directly or indirectly, "commissions, or brokerage fees, or allowances or discounts in lieu thereof on such purchases" (Com., Par. Five; R. p. 9).

The complaint then charged that the payment or granting by respondents of commissions, brokerage, or other compensation, or discounts in lieu thereof, to direct buyers was in violation of Subsection (c) of Section 2 of the Clayton Act, as amended (Comp., Par. Six, R. p. 11).

By their answer dated December 11, 1946, respondents admitted the above allegations of fact as set forth in the complaint (Ans., R. p. 16). Further than this, respondents' answer (R. pp. 59–61) to the application for enforcement admits all of the above including Paragraph 5 of the application which alleges that

most favorable price or most favorable commission or brokerage. If the merchandise is lost or damaged in transit, the direct buyer files the claim with the carriers and collects damages from the carriers for his own account. The direct buyer stores the goods purchased in his own warehouses and insures such goods at his own expense or stores such goods in a public warehouse and pledges warehouse receipts and insurance contracts on such products as security for bank loans.

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By their answer dated December 11, 1946, respondents admitted the above allegations of fact as set forth in the complaint (Ans., R. p. 16). Further than this, respondents' answer (R. pp. 59–61) to the application for enforcement admits all of the above including Paragraph 5 of the application which alleges that

the Commission's order "since the date of its issuance has been, and is now, in full force and effect."

The Commission and the courts have consistently construed and applied § 2 (c) as an absolute and unconditional prohibition of the payment of commission by sellers to buyers and buyers' agents upon the buyers' own purchases. This is well settled.[2]

We therefore respectfully submit that the fact that respondents, since June 19, 1936, have been engaged in the sale and distribution of canned sea food products in interstate commerce to direct buyers, purchasing in their own name and for their own account for resale; and that respondents paid to such buyers brokerage or commission in violation of Section 2 (c) of the Clayton Act, as amended, was established in the record by judicial admissions. It is fundamental that "judicial admissions are proof possessing the highest probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to contradict them." *Hill* v. *Federal Trade Commission,* 124 F. 2d 104, 106 (C. A. 5, 1941).

The Commission's findings as to the facts and its

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[2] *Modern Marketing Service, Inc., et al.* v. *Federal Trade Commission*, 149 F. 2d 970, 978 (C. A. 7, 1945); *Southgate Brokerage Co., Inc.* v. *Federal Trade Commission*, 150 F. 2d, 607, 609 (C. A. 4, 1945); *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 398 (C. A. 1, 1940); *Webb-Crawford Co.* v. *Federal Trade Commission*, 109 F. 2d 268, 269 (C. A. 5, 1940), cert. denied 310 U. S. 638 (1940); *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667, 673 (C. A. 3, 1939), cert. denied 308 U. S. 625 (1940); *Oliver Brothers* v. *Federal Trade Commission*, 102 F. 2d 763, 768, 769 (C. A. 4, 1939); *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. 2d 687, 692 (C. A. 2, 1938).

order to cease and desist were therefore properly made and properly entered.

2. The Commission's application for enforcement charges respondents with violating its order to cease and desist

Section 11 of the Clayton Act (38 Stat. 734, 735; 15 U. S. C. A. 21) provides that if a respondent "fails or neglects to obey" an order entered under the statute, "while the same is in effect, the Commission * * * may apply to the Circuit Court of Appeals * * * within any circuit where the violation complained of was or is being committed or where such [respondent] resides or carries on business, for the enforcement of its order * * *." It is therefore incumbent upon the Commission, in an application for enforcement, to charge a violation of its order and allege facts showing that its application is filed in the proper court. The application here satisfies those requirements.

The Commission's order to cease and desist directs corporate respondent Whitney & Company and its officers and respondent James R. O'Brien, and his representatives, agents and employees, "in connection with the sale and distribution of canned salmon, canned tuna, canned mackerel, and other canned sea food products" in interstate commerce, to discontinue:

> Paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation, allowance or discount in lieu thereof, upon purchases made for such buyer's own account.

In its application for enforcement, the Commission alleged that respondents "are engaged in busi-

ness within the territorial jurisdiction of this court and have their principal place of business at 860 Central Building, Seattle, Washington" (R., pp. 31–32). The Commission further alleged that:

> Respondents have failed, neglected and refused to obey the Commission's said order to cease and desist, in that since the 25th day of March 1946, they have continued to pay, grant or allow commission or brokerage, or other compensation or allowance or discount in lieu thereof, to buyers who purchase in their own name and for their own account respondents' canned sea food products for resale (R., p. 34).

The application sets forth in detail two specific sales made by respondents in interstate commerce to Christian Brokerage Company, Atlanta, Georgia, and alleges such sales to be "typical and representative of sales made in interstate commerce in which respondents have violated the cease and desist order issued as aforesaid" (R., pp. 34–37).

The Commission's application, we therefore submit, was properly filed with this court and clearly charges violation by respondents of the Commission's order.

3. Formal proof of violation of the Commission's order by respondents is not a prerequisite to the entry of a decree of enforcement

The jurisdiction of this court to consider and the right of the Commission to file an application for enforcement of the Commission's order is purely statutory. The court has only such authority in reference to the Commission's orders, and the Commission has only such right to apply for an enforce-

ment thereof, as is granted by the express word of the statute. The Act provides two methods whereby jurisdiction over the final orders of the Commission can be acquired by the courts. Each is separate, distinct and independent of the other, seeking entirely different action by, and asking entirely different affirmative relief from, the court, and the jurisdictional requirements vary slightly as to each. One may be initiated by the Commission as in the instant case, seeking enforcement of its order; the other may be initiated by the respondent for the purpose of having the order set aside.

The applicable provisions of the statute (Clayton Act, § 11; 38 Stat. 734–735; 15 U. S. C. 21) in the instant matter are as follows:

> If such person [against whom an order to cease and desist has been issued] fails or neglects to obey such order of the Commission * * * while the same is in effect, the commission * * * may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record taken and the report and order of the Commission * * *. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power

> to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *.

From the words of the applicable provision, the Commission must determine its right to file an application for enforcement and the necessary steps to be taken thereby to conform with the requirements, and, by the same token, the Court must determine its right to take jurisdiction of such an application and the limit of its powers and duties in reference thereto.

While this case is the first of its kind in this Court, similar proceedings have been before the Second, Fourth, and Seventh Circuits.

The Second Circuit has interpreted the provisions of the Act to require that it first affirm the order of the Commission, and, if valid, refer the matter back to the Commission as Special Master to take evidence upon the question of violation and report to the Court whether the order has been violated. *Federal Trade Commission* v. *Standard Education Society,* 86 F. 2d 692, 698 (C. A. 2, 1936); *Federal Trade Commission* v. *Balme,* 23 F. 2d 615, 621 (C. A. 2, 1928), cert. denied 277 U. S. 588 (1928); *Federal Trade Commission* v. *Jack Herzog & Co., et al.,* 150 F. 2d 45 (C. A. 2, 1945); and *Federal Trade Commission* v. *Standard Brands, Inc.,* now pending in the Second Circuit,[3] Circuit Court No. 21742.

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[3] In this case prior to filing its application for enforcement, the Commission issued an order directing one of its trial examiners to conduct formal adversary hearings on the question of violation of its order and report to the Commission. Upon completion of the hearings the trial examiner made his report, exceptions were filed

On the other hand, the Seventh Circuit in *Federal Trade Commission* v. *Standard Education Society,* 14 F. 2d 947, 948 (C. A. 7, 1926), in substance held that the violation of the Commission's order is a condition precedent to the court's taking jurisdiction and that it would not consider the validity of the order until it had been shown to have been violated. However, in *Federal Trade Commission* v. *Morrissey,* 47 F. 2d 101, 102 (C. A. 7, 1931), the Seventh Circuit in substance held that: "If from proceedings following the entry of the order it is fairly apparent that in some respects the order has not been obeyed, an affirming decree by the court will be justified."

The Fourth Circuit, in considering the same question raised as to procedure on enforcement, agreed with the position taken by the Second Circuit. It accordingly determined the validity of the Commission's order and on the question of violation referred the matter back to the Federal Trade Commission to act as Special Master to take and receive evidence upon this question and report to the court whether the order had been violated. *Federal Trade Commission* v. *Baltimore Paint & Color Works, Inc.,* 41 F. 2d 474 (C. A. 4, 1930).

Notwithstanding these decisions, we do not believe that the provisions of the Act, either specifically or by normal, logical inference flowing from the words

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thereto by counsel and the matter was briefed and orally argued before the Commission. The Commission made a formal report and findings. The record was certified, along with the record upon which the order was based, to the Circuit Court of Appeals in conjunction with and in support of the Commission's application for enforcement.

used therein, require the Commission, as a condition precedent to the granting by the Court of Appeals of a decree affirming and enforcing the order, to prove to the satisfaction of the court that a respondent has violated the order issued by the Commission, and in the present proceeding we respectfully ask this court to consider the Commission's application for affirmance and enforcement of its order as a case of first impression and to determine the question upon the basis of the language used in the Act and legislative history.

As will be seen from the language of the statute (supra, p. 13), the statute refers to two separate and distinct, but related, matters: (1) the right of the Commission to file an application for enforcement and (2) the jurisdiction of, and the matter to be determined by, the court upon the filing of such an application. The applicable provision of the statute in reference to the filing of an application for enforcement is as follows:

> If such person [against whom an order to cease and desist has been issued] fails or neglects to obey such order of the Commission * * * while the same is in effect, the Commission * * * may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record taken and the report and order of the commission * * *.

Clearly from that language the statute does not in terms specifically require proof of a violation of an order as a condition precedent to the entry of a decree of enforcement. In fact, it neither refers to the authority of the court to enter a decree of enforcement nor to the authority of the court to enter any other decree. It refers solely to the right of the Commission to file its application seeking a decree of enforcement and not to the jurisdiction or power of the court to enter any decree. The jurisdiction and power of the court to enter a decree under such application is found in the next sentence of this statute. And since statutes should be strictly construed, we do not believe that this court can properly, without a difficult stretch of legal interpretation, construe the Act so as to require the Commission to prove violation of its order before it can obtain from this court a decree making its orders effective and binding upon violators of the law. Such a construction requires the Commission to prove a violation of law by the same respondent two separate and distinct times before its order can be made effective; and a third time before the violator of the Act can be punished. Surely Congress had no such plan in mind when it enacted the Federal Trade Commission Act and the Clayton Act in an effort to supplement and strengthen the antitrust laws.

There could be no question as to this were it not for the inclusion of the words "If such person fails or neglects to obey such order". We believe that those words constitute a subordinate clause limiting the words "the Commission * * * may apply".

If these words impose any limitation or condition upon the jurisdiction of the courts then it is a *condition precedent* to the court's jurisdiction. The factual condition referred to must therefore be in existence prior to the filing of an application for enforcement and must not only be affirmatively alleged in such application but must either be proved or the record must affirmatively *establish its existence before a decree of any kind can be entered by the court.* If such factual condition is not established the court would not have jurisdiction and must dismiss the application without entry of a decree of affirmance. In the *Standard Education, Balme* and *Herzog* cases (*supra,* p. 14), the Second Circuit has taken the position that such words are not a limitation or a condition precedent to the court's jurisdiction, otherwise it had no authority to affirm the orders in those cases. In the *Baltimore Paint & Color Works* case (*supra,* p. 15), the Fourth Circuit adopted the same view of the statute.

The clause, we believe, clearly sets up a condition precedent to the filing of an application for enforcement and not a condition precedent to the entry by the court of an enforcement decree. The question whether the condition exists must therefore be determined before rather than after such an application is filed. This being true, the question whether the order of the Commission has been violated, like the question whether the Commission has reason to believe that the law has been violated before issuing its complaint, necessarily is one for the Commission to determine. The statute authorizes the Commission,

and the Commission alone, to institute enforcement proceedings and it nowhere confers any authority upon the courts to review the Commission's decision to do so or to determine itself whether the order has been violated prior to the entry of a decree of enforcement.

It therefore appears to us that the question whether a respondent has violated the Commission's order is not a judicial, but an administrative, question and one upon which the Commission's determination is conclusive. It is, as we have indicated above, a question of exactly the same character as that which the Act requires the Commission to determine before issuing a complaint, namely, whether there is "reason to believe that any person is violating" the statute (Clayton Act § 11, 38 Stat. 734; 15 U. S. C. § 21). It is well established, and needs no argument, that the Commission's determination of that question is final and not subject to judicial review.[4] There is no reason to hold otherwise with respect to the question whether the Commission has properly filed an enforcement application, for, as we have already stated, in neither case is the proceeding criminal or punitive. A complaint, issued by the Commission when it has reason to believe that a person is violating the law, can result in no more than an order

[4] *Hills Brothers* v. *Federal Trade Commission*, 9 F. 2d 481, 483–484 (C. A. 9, 1926), cert. denied 270, U. S. 662 (1926), cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 385 (1938); *Miles Laboratories* v. *Federal Trade Commission*, 50 F. Supp. 434, 437 (D. C. 1943), aff'd 140 F. 2d 683, 684 (App. D. C. 1944), cert. denied 322 U. S. 752 (1944); *Perkins* v. *Endicott Johnson*, 128 F. 2d 208, 225 (C. A. 2, 1942), aff'd 317 U. S. 501 (1943).

to cease and desist, and, an application for enforcement, if such person has failed or neglected to obey such order, can result in no more than a decree commanding obedience to the order. Punishment cannot be imposed for any violation occurring prior to that decree. To punish a violator of the Commission's order, contempt proceedings must be instituted based upon violations that occur after the Court has affirmed the order and commanded obedience to it.

In issuing its complaint and in filing its application for enforcement, Congress, we think, has enjoined upon the Commission the duty of acting reasonably and only upon probable cause, but Congress has left to the sole discretion of the Commission the question whether its action is reasonable and whether probable cause exists. Recognizing its responsibility in administering the Clayton Act, the Commission does not lightly charge any respondent with having violated an order to cease and desist. Before filing an application in a United States Court of Appeals, for enforcement of an order to cease and desist, the Commission conducts a preliminary informal investigation in order to ascertain whether the respondent is obeying the Commission's order. The conduct of the respondent is thoroughly and carefully investigated by members of the Commission's staff and every effort is made to conduct such investigation fairly and impartially. The results of such informal investigation are placed in the Commission's confidential files which are then reviewed by other members of the Commission's staff and by the Commission itself.

In view of the above, we do not believe that the court would be justified in assuming that the Commission will abuse its discretion in this respect. On the contrary, it is to be presumed that the Commission will act with discretion and with propriety, *Perkins* v. *Endicott Johnson,* 128 F. 2d 208, 225 (C. A. 2, 1942), aff'd 317 U. S. 501 (1943). As the court declared in *Federal Trade Commission* v. *Baltimore Paint & Color Works,* 41 F. 2d 474, 476 (C. A. 4, 1930):

> The Commission alleges in its petition that its order is being violated, and the respect due by the courts to an independent agency of the government forbids the presumption that this allegation of the Commission is not made in good faith and based upon substantial grounds. It is inconceivable that the Commission could make this application to this court without having good ground upon which to make it, and the Commission is certainly to be presumed to be acting in good faith.

That Congress not only did not authorize or grant to the court the right to review the Commission's administrative determination that its order had been violated, but that Congress actually limited and restricted the matters which the court was to review, seems crystal clear from the express provision of the statute. The applicable provision as to the court's jurisdiction and the questions to be determined is as follows:

> Upon such filing of the application and transcript the court shall cause notice thereof to

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> be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *.

The words "Upon such filing of the application and transcript" refer to that portion of the statute, immediately preceding, which is applicable to the Commission's filing its application for enforcement, discussed *supra,* page 14. Reading the two portions of the statute together it will be noted that before the court can acquire jurisdiction three separate and distinct acts must take place: (1) the Commission must file its application for enforcement, (2) the Commission must certify and file with its application "a transcript of the entire record taken and the report and order of the Commission," and (3) the court must cause notice of the happening of (1) and (2) to be served upon respondent. Those are jurisdictional requirements and it is more than significant that Congress did not make "respondent's violation of the order" one of them.

The statute requires the Commission to certify a transcript of the entire record. The only record in existence which the Commission could possibly cause to be transcribed and certified is the record made before it in formal hearings under a complaint charging respondent with violation of the law. That is the record transcribed and certified with the Commission's application here.

When the three jurisdictional requirements, as set out above, have been complied with the statute then provides that "* * * thereupon [the court] shall have jurisdiction of the proceeding and of the question determined therein". The only "proceeding" that has taken place in which any question involving respondents has been determined was the proceeding before the Commission under formal complaint. The only "question" determined in that proceeding and contained in the certified transcript was whether respondents had violated the law as charged.

It therefore necessarily follows that the word "proceeding" and the phrase "question determined therein" appearing in the language conferring jurisdiction upon the court do not refer to any proceeding on the question of respondents' violation of the order but refer to the original proceeding before the Commission on the question of violation of law which resulted in the order to cease and desist. That this is true is confirmed by the language that immediately follows: viz "and [the court] shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *." The only pleading, the only testimony, and the only proceeding in the certified transcript is the proceeding before the Commission on the question of respondents' violation of law. The court's jurisdiction is therefore restricted to the legality of the proceedings and the validity of the order and not extended to the question of whether respondents have violated the order. Had Congress

intended that the jurisdiction of the Court of Appeals, under an application for enforcement, should include, not only the legality of the proceedings before the Commission on the question of violation of the law and the validity of the order predicated thereon, but also should include the question of violation of the order, then surely Congress could and would have used language other than that appearing in the Act. It *is the record of the proceeding before the Commission under formal complaint on the question of violation of the law*—containing the "pleading, testimony", report of the Commission and order—*upon which the court has* "the power to make and enter * * * a decree affirming, modifying, or setting aside the order * * *", *and not a record made subsequent to the entry of the order, subsequent to the filing of the application for enforcement,* and subsequently transcribed and certified to the court, upon which the court has authority to make and enter such decrees. The Act just does not so provide.

Nothing in the statute contemplates that courts shall enter two decrees in a proceeding before it seeking an enforcement of the Commission's order—one a decree "affirming" the order and the other a decree "enforcing" it—and a third decree in a contempt proceeding. Neither is there any language or word used in the Act, nor can there be any reasonable inferences flowing from the language used in the Act which require the Commission to prove two separate violations of the law before it can vitalize its order to cease and desist so as to make it effective in enforcing the statute under which the Commission operates.

On the contrary, the Act clearly contemplates the entry of a single decree in every enforcement proceeding, namely, a decree either "affirming, modifying, or setting aside" the Commission's order. The Act also clearly contemplates that it is only necessary for the Commission to prove once, and only once, by substantial, reliable evidence that respondents have violated the law before the Commission can enter a valid order to cease and desist and upon which the Commission is entitled to a decree from the courts affirming such order. Since the statute does not refer *ipsissimis verbis* to a decree "enforcing" an order, it is obvious that its reference to a decree "affirming" an order means a decree which both adjudges the order valid and commands obedience to it. That this is true is apparent from the fact that the Act refers to the proceeding as one for the "enforcement" of the Commission's order (38 Stat. 735; 15 U. S. C. 21), the statute's provision that the jurisdiction of the Circuit Court of Appeals "to enforce, set aside, or modify orders of the Commission * * * shall be exclusive" and the provision of Section 128 (e) of the Judicial Code that such courts are "empowered to enforce, set aside or modify orders of the Federal Trade Commission, as provided in * * * Section 11" of the Clayton Act (43 Stat. 937; 28 U. S. C. 225 (e)). The decree of this court therefore should be entered, as the statute provides, solely upon the record certified to the Court by the Commission. There is no other record in existence and the Act does not contemplate any other record which might be certified to the court.

This court has held that conduct violative of the Commission's order which the court has merely "affirmed," without specifically commanding obedience thereto, constituted contempt of court. On a petition to set aside the order of the Commission this court in *Pacific States Paper Trade Assn., et al.* v. *Federal Trade Commission,* 4 F. 2d 457 (C. A. 9, 1925), rehearing denied March 9, 1925, modified and as modified affirmed the Commission's order. Thereafter the Commission filed with this court a petition for rule requiring the Association and others to show cause why they should not be guilty of contempt and punished for violating the court's decree, *Federal Trade Commission* v. *Pacific States Paper Trade Assn., et al.,* 88 F. 2d 1009 (C. A. 9, 1927). The matter was argued and submitted on stipulation. In a *per curiam* decision the court ordered that the "proceedings be dismissed as to respondents not served, * * * and that other respondents be adjudged guilty of contempt and fined $10,000 * * *".

On three occasions the Second Circuit has also held respondents in contempt where the court has merely affirmed the Commission's order. Once in *Biddle Purchasing Co.* v. *Federal Trade Commission,* No. 15624 (Order of June 5, 1941), not reported, and twice in *Leavitt* v. *Federal Trade Commission,* No. 9037 (Orders of December 24, 1935, and February 4, 1929), not reported. (Contra: *Federal Trade Commission* v. *Fairyfoot Products Co.,* 94 F. 2d 844 (C. A. 7, 1938).)

Our view that proof of a violation of the Commission's order is not a condition precedent to the

entry of a decree of enforcement is also supported by the courts' practice in proceedings to review and set aside the Commission's orders. In those proceedings, the courts have uniformly entered decrees commanding obedience to valid orders without any inquiry whatever as to whether the orders have been violated.[5] Yet the statute provides that in such proceeding the courts' "jurisdiction to affirm, set aside, or modify the order of the Commission" shall be "the same * * * as in the case of an application by the Commission * * * for the enforcement of its order."[6] In view of the very clear provisions of

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[5] *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. 2d 687 (C. A. 2, 1938), cert. denied 305 U. S. 634 (1938); *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511, 520 (C. A. 6, 1944); *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 400 (C. A. 1, 1940). In the *Biddle* case the court's decree did not, in terms, command obedience to the Commission's order, but merely "affirmed." Biddle was later held in contempt of court and fined, however, for continuing the practices which the order enjoined. See the court's order of June 5, 1941, in that case (No. 15624).

[6] The pertinent paragraph of the statute reads as follows: "Any party required by such order of the Commision * * * to cease and desist from a violation charged may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the Commission * * * be set aside. A copy of such petition shall be forthwith served upon the Commission * * *, and thereupon the Commission * * * forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript, the court shall have the *same jurisdiction* to affirm, set aside, or modify the order of the Commission * * * as in the case of an application by the Commission * * * for the enforcement of its order, and the findings of the Commission * * * as to the facts, if supported by testimony, shall in like manner be conclusive." 38 Stat. 735–736; 15 U. S. C. 21. [Italics supplied.]

the Act, we submit that there is no valid reason for distinguishing between the conditions upon which an enforcement decree will be entered in the two types of proceedings. If the Commission is entitled to a decree of enforcement without proving a violation of its order in one instance, it is equally entitled to a decree of enforcement without the proof of a violation in the other. This court in *Electro Thermal Co.* v. *Federal Trade Commission,* 91 F. 2d 477, 481 (C. A. 9, 1937), recognized this principle and so held. This case was upon a petition to set aside the Commission's order. In its brief, but not otherwise, the Commission asked for a decree of affirmance and enforcement. Petitioner moved to strike that portion of the Commission's brief upon the ground that it was not properly before the court since a violation of the cease and desist order must be shown before a decree of enforcement can be granted. In its opinion, at page 481, the court set out the provisions of the statute applicable to the filing of an application for enforcement by the Commission and to the filing of a petition to set the order aside by respondent and held that in view of the statute "The Commission's informal prayer for affirmation of the Commission's order is properly here. It appears that the court is vested with plenary jurisdiction no matter which party brings the cause before it. The same language as to the court's jurisdiction is used in one case as in the other." We submit that this is further in support of our contention that the jurisdiction of the court is not based upon and the language

of the statute does not so state a violation of the order by respondents.

Had Congress intended to require the Commission to prove a violation of its order to cease and desist before it could obtain a decree of enforcement, we submit that it would have made that fact clear by including an express provision to that effect, as it did in dealing with the enforcement of orders of the Interstate Commerce Commission and the orders of the Secretary of Agriculture, issued, respectively, under the Interstate Commerce Act [7] and the Packers and Stockyards Act.[8] Insofar as here pertinent, each of those statutes provides, as does the Clayton Act, that if any person "fails to obey" an order of the Interstate Commerce Commission or the Secretary of Agriculture, as the case may be, the Commission or the Secretary may institute court proceedings "for the enforcement of such order." But *unlike* the Clayton Act, each statute also expressly provides that prior to the entry of an enforcement decree the court shall determine whether the person complained of "is in disobedience" of the order in question (7 U. S. C. 216; 419 U. S. C. A. 16 (12)). The pertinent sections of the two statutes are substantially identical.[9]

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[7] Act of June 29, 1906, Ch. 3591 § 5, 34 Stat. 584, 591, as amended by an Act of June 18, 1910, Ch. 309, § 13, 36 Stat. 539, 555; 49 U. S. C. 16 (12).

[8] Ch. 64, § 315, 42 Stat. 159, 167–168; 7 U. S. C. 216.

[9] We quote the Packers and Stockyards Act as illustrated: "If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby,

It appears to us, therefore, that the omission of a similar provision from the Clayton Act is not only significant but was intentional. That this is true is evident from the fact that the Interstate Commerce Act antedated the Clayton Act by over eight years, and Congress was, presumably, fully familiar with the provisions and history of the earlier statute at the time it enacted the later. This conclusion, as well as our view that proof of a violation of an order to cease and desist is not a condition precedent to the entry of a decree of enforcement under the Clayton Act, is fortified by the legislative history of the Federal Trade Commission Act as originally enacted, the enforcement provisions of which were virtually identical with those of the Clayton Act (Ch. 311, § 5, 38 Stat. 717, 719, 720). Dealing with the enforcement of Commission orders entered under the former statute, the statement of the managers on the part of the House declared in the Conference Report on the Act:

> The orders of the Commission will be enforceable only through the courts. In order to obtain the speediest settlement of disputed questions, it is provided that the Commission shall apply for the enforcement of its orders

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or the United States by its Attorney General, may apply to the District Court for the district in which such person has his principal place of business for enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience to the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives, from disobedience of such order and to enjoin upon him or them obedience to the same" (7 U. S. C. 216).

> directly to the Circuit Court of Appeals. The findings of the Commission as to the facts are to be conclusive. The court's function is restricted to passing on questions of law. The court shall determine such questions on the record in the proceeding before the Commission. No new evidence shall be adduced on the hearings in the court except upon good cause shown, and if the court permits the introduction of additional evidence, such evidence will be taken by the Commission and then filed in court with its new or modified findings based thereon. [H. R. Rep. No. 1142, 63d Cong. 2d Sess. (1914) 19.]

To the same effect is the statement made by Senator Cummins on the floor of the Senate in explaining the procedure agreed upon with respect to the enforcement of the Commission's orders. He said:

> When the Commission makes its order for the discontinuance of a practice or method of unfair competition, the Commission, if the order is not obeyed, may make an application which is in substance, of course, a suit, through the Circuit Court of Appeals through the appropriate circuit for the enforcement of its order. With the application, it is to file a certified copy of the transcript, including the evidence and the orders that it has taken and made in the case. The Court of Appeals thereupon issues a subpena or notice to the person or corporation against whom or which the order was issued. It thereupon tries the case, when the pleadings are made, upon the transcript furnished to it by the Commission. In that trial, the findings of the Commission are made

> conclusive if supported by testimony as to the facts, leaving the law of the case wholly open to the Circuit Court of Appeals. At the conclusion of their trial it may affirm or reverse or modify the order which the Commission has made.
>
> There is a further provision that if, upon showing, it appears that there ought to be other testimony admitted than that which was received by the Commission, the Circuit Court of Appeals can refer the matter again to the Commission to take such further testimony, which is certified in the same way, and its findings upon further testimony have the same effect as the original findings [51 Cong. Rec. 14768 (1914)].

Although the above-quoted statements relate to the Federal Trade Commission Act, rather than to the Clayton Act,[10] they are nevertheless pertinent in considering the latter and they clearly show, in our opinion, that proof of a violation of the Commission's orders was not intended to be a condition precedent to the entry of decrees of enforcement. The requirement that such proof be made is not conducive to the "speediest" settlement of the questions at issue before the Commission. It greatly expands the "restricted" functions of the courts. It involves a departure from the "record in the proceedings be-

[10] So far as we can find, nothing in the legislative history of the Clayton Act itself throws any light upon the question. But the Clayton Act and the Federal Trade Commission Act are *in pari materia*, they were enacted and approved less than a month apart, and their enforcement provisions, as heretofore stated, are substantially identical.

fore the Commission" and it requires the Commission to prove a violation of the law by the same respondent on two separate occasions. It rejects the explicit intention of Congress that no "new evidence may be adduced on the hearings in court" except under a provision of the statute which the Second Circuit has held does no more than provide for a form of procedure "analogous to a motion for a new trial upon newly discovered evidence." *Fashion Originators Guild* v. *Federal Trade Commission,* 114 F. 2d 80, 82–83 (C. A. 2, 1940), aff'd 312 U. S. 457 (1941).[11]

Further evidence in support of our position, we think, is also found in the fact that when the National Labor Relations Act was before it, Congress struck part of an enforcement provision framed in substantially the same language as the corresponding provision of the Clayton Act, and made it clear beyond any possibility of dispute that the Labor Board was not to be required to prove a violation

[11] The provisions referred to read as follows in both the Federal Trade Commission Act and the Clayton Act: "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, authority, or board, the court may order such additional evidence to be taken before the commission, authority, or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission, authority, or board may modify its findings as to the facts, or make new findings, which, if supported by testimony, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence." 38 Stat. 720, 52 Stat. 113, 15 U. S. C. 45 (c); 38 Stat. 735, 15 U. S. C. 21.

of its orders before obtaining decrees of enforcement.[12] The Conference report stated in that connection:

> Section 10 (e) of the Senate bill provided that "if such person fails or neglects to obey such order of the Board while the same is in effect, the Board may" petition any Circuit Court of Appeals, etc. House Amendment No. 15 strikes out the quoted phrase and substitutes "the Board shall have power to" petition any Circuit Court of Appeals, etc. * * * It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions * * * under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will * * * render a decree enforcing the [Commission's] order. As the majority of courts have declared under the Federal Trade Commission Act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though

[12] See National Labor Relations Act, § 10 (e), 49 Stat. 453, 454; 29 U. S. C. 160 (e); *National Labor Relations Board* v. *Fickett-Brown Manufacturing Co.*, 140 F. 2d 883, 884 (C. A. 5, 1944). (In a proceeding to enforce an order of the Labor Board "it is the validity of the Board's order when made which is in question, and * * * whether the employer has or has not complied with it is totally irrelevant.") *National Labor Relations Board* v *Clinton E. Hobbs Co.*, 132 F. 2d 249, 251–252 (C. A. 1, 1942). ("If the Board's order was proper on the record before it, the Board does not have to litigate in this court issues of fact as to whether the employer has complied with the order, as a condition of obtaining an enforcement decree.")

> presently terminated, will not be resumed in the future. If such practice is resumed, there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings. [H. R. Report No. 1371, 74th Cong., 1st Sess. (1935), 5.]

From all of the above, it would therefore seem clear that not only is there no statutory requirement but there is no rule of policy which requires the court to construe the Clayton Act as conditioning the Commission's right to an enforcement decree upon proof of a violation of an order under the Act. And Congress has imposed no such condition with respect to the enforcement of orders entered under the Federal Trade Commission Act as amended.[13] The most that policy can be said to require is that a respondent be afforded an opportunity for judicial review of the validity of an order against him before he is required to obey it. And that opportunity is in no degree impaired by our interpretation and construction of the statute. Upon hearing of the Commission's application for enforcement, the respondents are entirely free to contest the validity of the Commission's order—in fact, that is the proper and only time (except upon petition for review to set aside) in which the respondent does have an opportunity to contest such validity. The issue raised under an

[13] It is no longer necessary to institute enforcement proceedings at all under the Federal Trade Commission Act. Unless review of orders issued thereunder is sought within 60 days after their service, they become final, and their violation thereafter is subject to heavy civil penalties (Federal Trade Commission Act, § 5 (c), (g), (1), 52 Stat. 112–114; 15 U. S. C. 45 (c), (g), (1)).

application for enforcement is not the violation of the order by a respondent so as to impose a penalty or sound in damages, but the issue is whether or not the order is valid, upon which basis the court would be justified in commanding obedience thereto. If the order is invalid, the court will set it aside and the matter is at an end—this is true under an application for enforcement as well as under a petition for review. If the order is valid, there is no reason why the respondent should not be required to obey it forthwith, irrespective of whether the order has been violated. Before the Commission can proceed against a respondent to punish for a violation of its order, three things are a prerequisite thereto: (1) A decree of the court affirming the order, (2) and commanding obedience thereto, and (3) a violation of the order subsequent to such a decree. It is this violation, it appears, subsequent to the entry of the decree of the court which necessitates the Commission to prove the violation charged.

We have already indicated that the Commission does not lightly charge a respondent with violation of its orders, but proceeds to investigate such alleged violation as carefully as it is possible to do so, throwing about the respondent every fair means at its disposal to enable the respondent to clearly demonstrate in a manner and by methods and means which would lead a reasonable person to arrive at the conclusion that respondent is not violating the order. We, of course, recognize that notwithstanding these precautions the Commission may be mistaken in its view that a respondent has failed to comply with

an order. But the probability of such error, we suggest seriously, is not great, and in no case is the Commission's conclusion arrived at arbitrarily. Moreover, a respondent can suffer no harm from the entry of a decree of enforcement any more than he can suffer harm from a decree of affirmance. It is respondent's duty to comply with a valid order to cease and desist, and a decree commanding obedience neither deprives him of any right nor does it impose upon him any penalty. Not until he is accused of violating such a decree is respondent, as we have above indicated, subject to punishment, and that accusation, of course, must be based on conduct occurring after the decree was entered and not conduct occurring prior to the application for enforcement.

In the circumstances, no considerations of fairness to respondents justify imposing upon the public the delay and expense involved in requiring the Commission to prove that a valid order to cease and desist has been violated before it will be enforced. We therefore seriously urge this court to carefully analyze the provisions of the Act applicable here, to give careful and thoughtful consideration to the argument here presented, to study the decisions of the Second Circuit, the Fourth Circuit and the Seventh Circuit herein referred to; to consider its former decisions in the *Pacific States Paper* (*supra,* p. 26) and *Electro Thermal* cases (*supra,* p. 28); and after weighing the pros and cons of the entire matter, see if it can come to the conclusion that the position taken by the Commission is correct; that the Act does not specifically require nor did Congress intend

that the Commission must prove a violation of law a second time before the Commission's order can be vitalized by a decree of the court affirming and enforcing it.

It is, therefore, submitted that upon the basis of the Commission's application alone its order here should be affirmed and the respondents commanded to obey it.

4. The evidence of violation of the Commission's order by respondents now appearing in the proceeding is sufficient to support an enforcement decree

A. Respondents have violated the Commission's order to cease and desist

Even though this court decides to follow the procedure of the Second Circuit, or the Seventh Circuit, we submit that there is no necessity for a decree of reference. There is evidence in this proceeding that establishes the fact of violation which will enable the court to enter one decree affirming and enforcing the Commission's order.

Respondents' answer denies that it has violated the order and asserts that the sales referred to and set out in the application as typical examples of violation of the order were not made "by Whitney & Company to Christian Brokerage Co. but was in fact [made] to various buyers by and through Christian Broker-

age Co. acting as broker and not as buyer" (R. p. 60). This, of course, raises an issue of fact.

In the *Morrissey* case (*supra*, p. 15) the Seventh Circuit did not enter a decree of reference. The court stated, at page 102, that the reason it was not following the procedure of referring the question of violation to the Commission was because (1) respondents' answer "failed in an important respect to assert compliance with the order" and (2) respondents' report of compliance setting forth the manner and method of compliance in "some material respects indicates that the order was not, in its entirety, complied with * * *." The court said: "This, in our judgment, will warrant entry of an affirming decree." The court then proceeded to modify the Commission's order and entered its decree enforcing the order as modified.

The instant matter in some respects presents a parallel situation. Respondents' answer "fails in an important respect to assert compliance with the order" and although there is no letter or report of compliance as there was in the *Morrissey* case, there is in the proceeding before this court evidence of facts "following the entry of the Commission's order" which makes it "fairly apparent that" the order has not been obeyed.

The Commission's conclusion that respondents were not obeying the order was based upon the result of an investigation made of Christian Brokerage Company of Atlanta, Georgia. Christian's records disclosed that Christian was receiving and accepting brokerage in violation of the Act. Among other factual mat-

ters disclosed by Christian's records was the receipt by Christian of brokerage from respondents on purchases made by Christian in its own name and for its own account. These records of the various transactions showing the payment by respondents of this brokerage were made by Christian in the usual course of its business and before Christian had any knowledge that the Commission would make an investigation to determine whether Christian was violating the Act or whether respondents were violating the order. Photostatic copies of Christian's records formed the basis for the Commission's application to this court for an enforcement decree and are attached to and made a part of that application.

These exhibits establish the following facts: On November 16, 1946, Whitney & Company, corporate respondent here, sold to Christian Brokerage Company, 2,000 cases of salmon. This salmon was shipped in Car No. NRC 17173. On December 6, 1946, Christian paid the Southern Railway Company the freight charges on this car of salmon by check No. 3931. On December 2, 1946, Christian received from respondent the sum of $541.75 which Christian earmarked as brokerage. This sum represented 2½% brokerage on $21,670.00, the net purchase price of this car of salmon to Christian. See Petitioner's Exhibits A and B. Christian resold this salmon to nine of its customers.

Petitioner's Exhibit C is a photostatic copy of an office memo dated July 14, 1947, recording the fact that Christian "bought [from] Whitney & Co. 1050 cases 48/1 Tall Golden Shore [Neutral] Chums or

maybe more Immediate Shipment" at a price of $16.50 a case. Petitioner's Exhibit D is a photostatic copy of a telegram dated July 16, 1947, from Christian to respondents confirming a telephone conversation of July 15 in reference to this purchase. Christian asks that Whitney increase the number of cases in the car and advises Whitney to ship another car if possible. Petitioner's Exhibit E is respondents' answer, advising Christian that a minimum car only is available but when shipment arrives from Alaska another car might be available. Petitioner's Exhibit F is a telegram from respondents advising Christian that the salmon had been shipped in Car No. NP 27571. Petitioner's Exhibit G is a letter from respondents to Christian enclosing invoice and bill of lading covering the shipment of salmon and advising Christian of a sight draft drawn on Christian in the sum of $18,298.50. Petitioner's Exhibit H is a photostatic copy of the invoice as follows:

> Sold to Whitney & Co., c/o Christian Brokerage Co., 1,109 cts. 48/1 Tall Golden Shore Chum Salmon @ $16.50—$18,298.50.

On the face of this invoice in handwriting appears the following:

> Am sure you understand necessity for this procedure.
>
> (Signed) "SR".

This notation in handwriting obviously refers to the fact that the invoice was made out as if this shipment of salmon had been consigned to Christian Brokerage Company for respondents' own account. This is an obvious attempt on the part of respondents

to prevent the record from showing that this carload of salmon was purchased by Christian in Christian's own name and for Christian's own account. There is another notation on this invoice which shows that on August 3, 1947, Christian paid Whitney & Company by check No. 4959 the sum of $18,024.02, the net cost of this carload of salmon to Christian. This payment is shown by photostatic copy of the check, Petitioner's Exhibit J. Petitioner's Exhibit N is a photostatic copy of Claim No. 541 which Christian filed against respondents for damage to this shipment of salmon. This exhibit shows that there were 60 cases damaged and there is a notation showing that the damage to 13 cases was caused by the railroad and the damage to 47 was caused by improper packing by Whitney. Petitioner's Exhibit O is another photostatic copy of the invoice covering this carload shipment of salmon and on this invoice appears the following notation "net $18,021.02" representing the net price to Christian of this salmon. There is another notation on this invoice which is as follows:

"Brokg.—$450.60—C11 8/11/47"

This notation establishes the fact that on the 11th day of August, 1947, Christian received from respondents a check in the sum of $460.50 which Christian earmarked as brokerage. This sum represents 2½% brokerage on $18,024.02, the net purchase price to Christian of this carload of salmon.

The most convincing evidence that the two sales here above discussed were *not* sales by respondents to "various buyers by and through Christian * * *

acting as brokers and not buyers" as alleged by respondents in their answer, is found in the terms of sale appearing on the invoices (Pet's. Exs. "A", "H" and "J"). The terms of sale were:

"1½% Ten Days, FOB Coast"

This 1½% is the usual discount allowed buyers for time payment of their account. This discount was allowed Christian by respondents on these sales and was in addition to the 2½% brokerage. If Christian was acting as a true broker Christian would not have been entitled to, nor would respondents have granted it, this 1½% discount. The 1½% discount for time payment would have been allowed by respondents to respondents' buyers or customers and not granted by respondents to respondents' broker. In addition to this respondents would have drawn sight drafts on each buyer for the amount of each buyer's purchase, less 1½% discount for time payment, and not drawn sight drafts on its broker for the entire purchase price of these two carloads of salmon.

The records of Christian show that Christian resold this carload of salmon at a profit to twenty of its customers.

The evidence speaks for itself. It consists of unimpeachable, silent witnesses—photostated copies of records made at a time when neither respondents nor Christian had any idea that the Federal Trade Commission would investigate these records to determine if respondents were paying Christian brokerage on purchases made by Christian in its own name and for its own account.

As stated (*supra,* p. 15) in proceedings of this nature the Seventh Circuit takes the position that the Commission must show a violation of its order before the court will enter a decree affirming. The Commission believes that the evidence of violation of its order appearing in this proceeding is of a similar nature and quality as the evidence referred to in that court's opinion in the *Morrissey* case; and, like that evidence, is such that this court would be justified in holding, as that court did, that the evidence warranted entry of an enforcement decree.

A decree of enforcement carries no penalty or punishment. If respondents are obeying the Commission's order a decree of enforcement should be of little concern or interest to them. However, if respondents are not obeying the Commission's order a decree of enforcement would have a most salutary effect. Respondents may not be overly concerned or worried about an order of the Commission which has not been affirmed and enforced by the courts; but, respondents are much concerned with and have the deepest respect for a decree of the court making the Commission's order its own and commanding obedience thereto. Such a decree will cause respondents to discontinue immediately such violations, clean their house and conduct their business in a lawful manner.

IV

CONCLUSION

It is, therefore, finally submitted: (1) that the Commission's order to cease and desist is valid, (2) that the Commission's application for enforcement

charges respondents with the violation thereof which is sufficient without evidence to entitle the Commission to a decree of enforcement, (3) that the evidence of violation is shown in this proceeding by unimpeachable photostatic copies of records showing payment by respondents of the prohibited brokerage, and (4) that this evidence is sufficient to warrant and justify a decree of enforcement. The Commission, accordingly, prays that its application be granted and that the court enter its decree affirming the Commission's order to cease and desist and commanding Whitney & Company, its officers, and James R. O'Brien, his representatives, agents, and employees to obey the same and comply therewith.

Respectfully submitted.

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